No. 06-480

IN THE

Supreme Court of the United States

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,
Petitioner,

v.

PSKS, INC., DOING BUSINESS AS KAY'S KLOSET . . . KAY'S SHOES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, ALASKA, ARKANSAS, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether this Court should overrule *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911), which held that minimum resale price maintenance agreements constitute *per se* violations of the Sherman Act, 15 U.S.C. § 1.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
A. The Direct Anticompetitive Effects of Minimum RPM Justify Continued Adherence to the *Per Se* Prohibition.	5
B. Petitioner Has Not Presented Empirical Evidence That the Higher Prices Caused by Minimum RPM Benefit Consumers or Competition.	10
C. The Importance of Clear Guidance Provides an Additional Reason To Adhere To *Dr. Miles.*	17
D. Applying the *Per Se* Rule Against Minimum RPM Is Consistent With Testing Other Vertical Restraints Against the Rule of Reason.	18
CONCLUSION	20

TABLE OF CITED AUTHORITIES

Page

Cases

324 Liquor Corp. v. Duffy,
479 U.S. 335 (1987) 5

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310 U.S. 469 (1940) 10

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457 U.S. 332 (1982) 5

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,
441 U.S. 1 (1979) 12, 13

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485 U.S. 717 (1988) 5, 10, 18

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445 U.S. 97 (1980) 5

Continental T.V., Inc. v. GTE Sylvania Inc.,
433 U.S. 36 (1977) 5, 6, 18

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530 U.S. 428 (2000) 4

Dr. Miles Medical Co. v. John D. Park & Sons,
220 U.S. 373 (1911) ..... i, 2, 5, 6

Cited Authorities

	Page
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In re Compact Disc Minimum Advertised Price Antitrust Litigation, 216 F.R.D. 197 (D. Me. 2003)	1
In re Minolta Camera Products Antitrust Litigation, 668 F. Supp. 456 (D. Md. 1987)	1
In re Nine West Shoes Antitrust Litigation, 80 F. Supp. 2d 181 (S.D.N.Y. 2000)	1
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Missouri v. American Cyanamid Co., 1997-1 Trade Cas. (CCH) 71,712 (W.D. Mo. Feb. 7, 1997)	1
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)	5
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775 F. Supp. 676 (S.D.N.Y. 1991) 1

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265 F. Supp. 2d 310 (S.D.N.Y. 2003) 1

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356 U.S. 1 (1958) 17

Northwest Wholesale Stationers, Inc. v.
Pacific Stationery & Printing Co.,
472 U.S. 284 (1985) 6

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1995-2 Trade Cas. (CCH) ¶ 71,215
(M.D. Pa. Dec. 15, 1995) 1

Planned Parenthood v. Casey,
505 U.S. 833 (1992) 4

Schwegmann Bros. v. Calvert Distillers Corp.,
341 U.S. 384 (1951) 5

Simpson v. Union Oil Co.,
377 U.S. 13 (1964) 5

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522 U.S. 3 (1997) 4, 5, 10, 19

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1997-2 Trade Cas. (CCH) ¶ 71,888
(N.D. Tex. June 27, 1997) 1

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252 U.S. 85 (1920) 5

United States v. Bausch & Lomb Optical Co.,
321 U.S. 707 (1944) 5

United States v. Parke, Davis & Co.,
362 U.S. 29 (1960) 5

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310 U.S. 150 (1940) 17

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15 U.S.C. § 1 *et seq.* 1, 2

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..... 7

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Page

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INTEREST OF AMICI CURIAE

Congress has authorized the Attorneys General of the States to bring federal antitrust actions to protect their citizens from the harmful effects of price-fixing and other anticompetitive conduct. 15 U.S.C. § 15c; *see also Georgia v. Pa. R.R. Co.*, 324 U.S. 439 (1945). The States therefore have a strong interest in ensuring that the courts apply clear and effective standards for liability under the Sherman Act, 15 U.S.C. §§ 1 *et seq.*

The States have a particular interest in preserving the *per se* prohibition against the price-fixing practice challenged here — minimum resale price maintenance ("minimum RPM"). The States vigorously prosecute cases involving minimum RPM agreements. *See, e.g., New York v. Salton, Inc.*, 265 F. Supp. 2d 310 (S.D.N.Y. 2003); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003); *In re Nine West Shoes Antitrust Litig.*, 80 F. Supp. 2d 181 (S.D.N.Y. 2000); *Texas v. Zeneca, Inc.*, 1997-2 Trade Cas. (CCH) ¶ 71,888 (N.D. Tex. June 27, 1997); *Missouri v. Am. Cyanamid Co.*, 1997-1 Trade Cas. (CCH) 71,712 (W.D. Mo. Feb. 7, 1997); *New York v. Reebok Int'l, Ltd.*, 903 F. Supp. 532 (S.D.N.Y. 1995), *aff'd*, 96 F.3d 44 (2d Cir. 1996); *Pennsylvania v. Playmobil USA*, 1995-2 Trade Cas. (CCH) ¶ 71,215 (M.D. Pa. Dec. 15, 1995); *New York v. Keds Corp.*, 1994-1 Trade Cas. (CCH) ¶ 70,549 (S.D.N.Y. Mar. 21, 1994); *Maryland v. Mitsubishi Elecs. Am.*, 1992-1 Trade Cas. (CCH) 69,743 (D. Md. Jan. 15, 1992); *New York v. Nintendo of Am.*, 775 F. Supp. 676 (S.D.N.Y. 1991); *In re Minolta Camera Prods. Antitrust Litig.*, 668 F. Supp. 456 (D. Md. 1987).[1] The States recovered more than $115 million in cash and $75 million in product for consumers in these cases.

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1. Information about these cases is available from the NAAG State Antitrust Litigation Database, http://naag.org/antitrust/search.

SUMMARY OF ARGUMENT

Section 1 of the Sherman Act prohibits any "contract . . . in restraint of trade or commerce." 15 U.S.C. § 1. In *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911), this Court held that a minimum RPM agreement — an agreement not to sell products below a specified minimum price — is *per se* a violation of section 1. *Dr. Miles* was correct when it was decided, and remains sound today, because minimum RPM agreements are direct agreements to raise retail prices, and there is no evidence that they offer any offsetting consumer benefits.

In this case, petitioner — a manufacturer of women's fashion accessories sold primarily in boutique stores — made an agreement with its retailers, including respondent, that they would not sell its products below specified minimum prices. When it learned that respondent had sold its products below the agreed-upon price, it cut off all shipments to respondent.

Petitioner does not dispute that, under *Dr. Miles*, its minimum RPM agreement violated the Sherman Act. Neither petitioner nor its *amici* offer adequate justification for overruling *Dr. Miles* and nearly a century of precedent adhering to it.

A. The available empirical data support *Dr. Miles*'s common-sense conclusion that minimum RPM agreements, by directly eliminating price competition, produce the very anticompetitive effect that the antitrust laws seek to avoid: raising consumer prices. Under "fair trade" laws, minimum RPM agreements were legal in some States from 1931 to 1976. Advocates for these laws championed the interests of merchants, in the form of higher profit margins, over those of consumers, who benefit from lower prices. And as the

economic literature on which petitioner relies acknowledges, the laws succeeded: consumer prices were higher in States that permitted minimum RPM agreements than in States that did not.

B. By contrast, no empirical evidence shows that minimum RPM agreements have offsetting benefits for consumers. Petitioner relies on a body of economic literature that speculates as to the possible procompetitive effects of minimum RPM agreements. But as Judge Easterbrook has explained, "no economic model is worth much without testing." Frank H. Easterbrook, *Antitrust Law Enforcement in the Vertical Restraints Area: Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 151 (1984). Although a model may raise "fascinating intellectual questions, . . . ultimately only good, hard, empirical work can offer answers." *Id.*

Despite widespread academic interest in the subject, no one has answered Judge Easterbrook's call for empirical research. Rather, a "dearth of empirical evidence on the use of" minimum RPM — indeed, an "empirical vacuum" — "seriously limits the development of economic understanding of these practices" and has left "[t]he host of competing theories . . . untested." Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J.L. & Econ. 263, 293 (1991). Untested economic hypotheses, whether promising or not, are no basis for overturning this Court's longstanding precedent.

C. Even if one could imagine hypothetical scenarios in which a minimum RPM agreement might, on balance, benefit consumers, countervailing interests justify continued adherence to the *per se* prohibition. Bright-line rules avert litigation by providing clear guidance to businesses that want to avoid antitrust violations. And litigation under a *per se*

rule is far less costly, and far more manageable, for all parties than litigation under a rule of reason. These considerations outweigh any hypothetical imperfections in the *per se* rule that petitioner asserts.

D. This Court's decisions applying the rule of reason to other vertical restraints, such as maximum RPM, are fully consistent with a *per se* prohibition on minimum RPM. Minimum RPM is different from these other practices. The anticompetitive effect of minimum RPM is direct, obvious, and empirically documented: Minimum RPM raises prices for consumers. By contrast, the anticompetitive effects of maximum RPM and other vertical restraints are neither direct, obvious, nor as fully documented by empirical evidence.

ARGUMENT

Although *stare decisis* is "not an inexorable command," this Court "approach[es] the reconsideration of [its] decisions . . . with the utmost caution." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). "*Stare decisis* . . . promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* (citations and quotation marks omitted). The doctrine mandates that "a departure from precedent . . . be supported by some special justification," *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citation and quotation marks omitted), that is, "some special reason over and above the belief that a prior case was wrongly decided," *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992). In interpreting section 1 of the Sherman Act, this Court has overturned prior decisions only when necessary to "adapt[] to changed circumstances and the lessons of accumulated experience." *Khan*, 522 U.S. at 20.

In the ninety-six years since *Dr. Miles*, this Court has repeatedly reaffirmed that minimum RPM agreements violate the Sherman Act *per se*.[2] Petitioner cannot point to either "changed circumstances" or "lessons of accumulated experience" that justify overruling this body of precedent. Parties to a minimum RPM agreement agree to maintain higher prices for consumers than would exist if price competition were allowed. Not surprisingly, "accumulated experience" has taught that minimum RPM agreements achieve their goal of raising prices for consumers. Petitioner's explanation for why higher prices benefit consumers or competition does not draw on practical experience or new empirical studies. Rather, it is based on untested academic speculation. This Court should not overturn longstanding precedent on the basis of unproven hypotheses.

A. The Direct Anticompetitive Effects of Minimum RPM Justify Continued Adherence to the *Per Se* Prohibition.

A century of experience confirms that *Dr. Miles* and the later decisions reaffirming it properly hold minimum RPM agreements *per se* illegal. The "*per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly

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2. *E.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 17 (1997); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341-43 (1987); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 348 (1982); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-02 (1980); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977); *Simpson v. Union Oil Co.*, 377 U.S. 13, 17-18 (1964); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 47 (1960); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 720-21 (1944); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85, 99-100 (1920).

anticompetitive." *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985); *see also Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (*per se* rules are appropriate "for conduct that ... would always or almost always tend to restrict competition") (citation and quotation marks omitted). A *per se* rule, rather than a rule of reason, may be justified "based on demonstrable economic effect." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977).

1. Minimum RPM agreements merit *per se* treatment because they have demonstrably anticompetitive effects that harm consumers. A minimum RPM agreement directly and intentionally eliminates price competition. It is by definition price-fixing. *See Dr. Miles*, 220 U.S. at 408 (noting that the object of minimum RPM is "destruction of competition and the fixing of prices"). With minimum RPM, suppliers and retailers agree to maintain higher prices than would exist absent the agreement. The intended higher prices are themselves the demonstrable economic effect. *See id.* (noting that "the advantages which the participants expect to derive" entail an "enhanced price to the consumer").

Empirical evidence confirms — if confirmation is needed — the common-sense notion that eliminating price competition has the anticompetitive effect of raising prices. Most of the data come from a natural experiment conducted by the States with federal authorization. From 1931 to 1976, States enacted "fair trade" laws that exempted minimum RPM agreements from federal antitrust scrutiny. *See generally* Thomas K. McCraw, *Competition and "Fair Trade": History and Theory*, 16 Res. Econ. Hist. 185 (1996). The laws' supporters believed that minimum RPM agreements would raise consumer prices and retailers' profits. Fair-trade laws were "'urged almost entirely by ... organized dealer groups,'" who hoped to "'eliminat[e] price competition'" and "'to bring pressure to bear on

manufacturers to place products under price maintenance at prices yielding dealer margins satisfactory to cooperating organized dealer groups.'" Thomas R. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence* 145 (FTC 1983) (quoting H.R. Rep. No. 94-341 (1975)); *see also* McCraw, *Competition*, *supra*, at 187 (traditional wholesalers and retailers lobbied for legalization of minimum RPM "to shield themselves against new forms of competition"). The retailers lobbying for the laws did not argue that increased prices and profits would promote consumer welfare by, for example, making manufacturers' distribution networks more efficient. Instead, they argued that vigorous competition — and falling consumer prices — were generally bad for the economy and for small businesses. *See* McCraw, *Competition*, *supra*, at 208-09.[3]

The effects of the fair-trade laws on consumer welfare were studied extensively. Academics and government agencies compared prices in fair-trade States to those in "free-trade" States, as the States that continued to prohibit minimum RPM agreements were called. As the economic literature on which petitioner relies acknowledges, empirical studies showed that fair-trade laws, and the minimum RPM agreements that they authorized, achieved their goals: consumer prices went up. *See* Howard P. Marvel & Stephen McCafferty, *The Political Economy of Resale Price Maintenance*, 94 J. Pol. Econ. 1074, 1084 (1986) ("[T]he price evidence ... strongly supports the view that prices in [fair-trade states] were higher than those in free-trade states."); Overstreet, *Resale Price Maintenance*, *supra*, at

3. Other New Deal programs, like the National Industrial Recovery Act, also were based on a skepticism of the value of competition. McCraw, *Competition*, *supra*, at 208-09; *cf.* Charles Van Hise, *Concentration and Control* 226 (1973) (original date of publication 1912) ("[s]ufficient cooperation should be allowed to prevent fierce and unrestrained competition which goes to the extent of reducing prices below a reasonable amount").

160 ("The price surveys indicate that RPM in most cases increased the prices of products sold with RPM.").

A 1956 United States Department of Justice study concluded that consumers in fair-trade States paid from 19 to 27 percent more than consumers in free-trade States. *Quality Stabilization: Hearings Before a Subcomm. of the Senate Comm. on Commerce*, 88th Cong. 6 (1963) (statement of Lee Loevinger, Assistant Attorney General, Antitrust Division, Department of Justice); *see also* Overstreet, *Resale Price Maintenance*, *supra*, at 113 (1970 Department of Justice study found that prices in fair-trade States were up to 37.4 percent higher than in free-trade States). The Department concluded that "the operation of a national price maintenance law . . . would cost the American consumer billions of dollars and have a powerful inflationary effect." *Quality Stabilization*, *supra*, at 6. For example, when Levi Strauss stopped requiring minimum RPM, retail prices for its merchandise plunged. For men's jeans alone, consumers saved an estimated $200 million in eighteen months. *See* William S. Comanor, F.M. Scherer & Robert L. Steiner, *Vertical Antitrust Policy as a Problem of Inference: The Response of the American Antitrust Institute* 8 (AAI Working Paper No. 05-04, 2005).

2. The link between minimum RPM and higher prices is not disputed by most economists. As Judge Easterbrook has explained, when economists claim that minimum RPM is procompetitive, they nevertheless assume that manufacturers "raise the price" and "increas[e] the dealer's margin" in order to "compensat[e] retailers" for something: "There is no such thing as a free lunch; the manufacturers can't get the dealer to do more without increasing the dealer's margin." Easterbrook, *Vertical Arrangements*, *supra*, at 156. Although offering different explanations for how the consumer supposedly benefits from higher prices, economists almost unanimously accept, and conform their hypotheses

to, the evidence that minimum RPM raises consumer prices and retailer margins.[4]

Petitioner likewise does not seriously dispute the link between minimum RPM and higher consumer prices. While petitioner asserts in passing that minimum RPM need not necessarily lead to higher prices, Pet. Br. at 17 n.7, the primary authority that petitioner cites for this proposition refutes it instead. *See* Marvel & McCafferty, *Political Economy*, *supra*, at 1084 (acknowledging that cross-jurisdictional price surveys "strongly support[]" the conclusion that prices were higher in fair-trade jurisdictions than in free-trade jurisdictions, although offering a theoretical explanation for why multi-state surveys are of little value). And the only "empirical" support petitioner offers is a single study, cited in the Overstreet survey, that found that minimum RPM was accompanied by increases in price among some

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4. *See, e.g.*, Kenneth G. Elzinga & David E. Mills, *The Economics of Resale Price Maintenance*, *available at* http://www.virginia.edu/economics/papers/mills/RPM20for20ABA.pdf ("[m]anufacturers . . . in perfectly competitive markets would never use RPM as a pricing practice"); Ralph A. Winter, *Vertical Control and Price Versus Nonprice Competition*, 108 Q.J. Econ. 61, 73 (1993) (proceeding from premise that manufacturers use "quasi-rents" to compensate retailers); Easterbrook, *Vertical Arrangements*, *supra*, at 141 (1984) (noting criticism that "resale price maintenance . . . enables manufacturers to jack up the retail price of its products," and responding, "So it does"); Overstreet, *Resale Price Maintenance*, *supra*, at 160 ("both procompetitive and anticompetitive economic theories of RPM predict that price maintenance will usually raise prices"); Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86, 87 (1960) ("a necessary condition to a manufacturer's use of resale price maintenance is that he must possess some degree of monopoly control over the price of the product"); *cf.* Marvel & McCafferty, *Political Economy*, *supra*, at 1075 (offering theory for why RPM might lower prices, but acknowledging that common-sense suggests that "the protection of higher dealer margins . . . would . . . seem to raise prices").

retailers and less significant decreases among others. But Overstreet concluded that the evidence shows that minimum RPM usually leads to price increases; and he expressly noted that economic models assume as much. *See* Overstreet, *Resale Price Maintenance*, *supra*, at 160.

3. The broad acceptance that minimum RPM results in higher prices, as it is intended to do, merits significant weight in deciding whether minimum RPM should be *per se* illegal. "'The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws.'" *Bus. Elecs. Corp.*, 485 U.S. at 742, 743 n.5 (quoting *United States v. Gen. Motors*, 384 U.S. 127, 148 (1966)). Indeed, this Court has defined unreasonable restraints of trade as those that are "so substantial as to affect market prices." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 500 (1940).

Thus, far from showing a need to overrule *Dr. Miles*, "lessons of accumulated experience" confirm the holding of that case. *Kahn*, 522 U.S. at 20. Minimum RPM agreements are, after all, agreements not to lower prices. They produce higher prices than would exist without those agreements. Absent substantial evidence that minimum RPM agreements have other procompetitive effects that outweigh the harm of higher prices, they are properly treated as *per se* illegal. That evidence has not been forthcoming.

B. Petitioner Has Not Presented Empirical Evidence That the Higher Prices Caused by Minimum RPM Benefit Consumers or Competition.

Minimum RPM has the obvious and empirically well-documented effect of raising prices. Thus, petitioner, in asking this Court to overturn settled precedent, must defend its counterintuitive claim that higher prices benefit consumers by somehow stimulating competition. Petitioner tries to do

so by arguing that the higher retailer profits that result from minimum RPM agreements "provide incentives for retailers to engage in promotional activities that are necessary to the efficient marketing," or otherwise to "invest in demand-creating services." Pet. Br. at 6-7. This echoes the economic literature, which speculates that minimum RPM agreements — by guaranteeing higher profits and preventing price competition by retailers — encourages retailers to provide additional services such as "pre-sale display, product-specific information, [consumer-friendly] store hours, adequate inventory, post-sale service, ... certifi[cation] of product quality, and other shopping amenities." Elzinga & Mills, *supra*, at 2.

1. But petitioner offers no real-world evidence supporting those assertions. Nor does the economic literature contain empirical support for the belief that minimum RPM has procompetitive effects. Thus, the following observation, made in 1987, continues to be true today: "the basic reason the *per se* rule continues to be accepted is that those . . . who would argue against it[] have not made their case outside of an economic laboratory." Sanford M. Litvack, *The Future Viability of the Current Antitrust Treatment of Vertical Restraints*, 75 Cal. L. Rev. 955, 956 (1987).

Although the procompetitive theories have been discussed by scholars since at least 1960,[5] the literature forthrightly acknowledges that there is an "empirical vacuum" that "seriously limits the development of economic understanding of these practices" and has left "[t]he host of competing theories ... untested."[6] Indeed, much of the

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5. *See* Telser, *Why Should Manufacturers Want Fair Trade?*, *supra* (1960) (advancing "free rider" theory for minimum RPM); *cf. id.* at 86 n.1, 87 n.2, & 89 n.4 (crediting articles going back to 1916).

6. Ippolito, *Resale Price Maintenance*, *supra*, at 293; *see also* Easterbrook, *Vertical Arrangements*, *supra*, at 151 (noting need for (Cont'd)

literature does not even purport to rest its conclusions on empirical work.[7]

This lack of empirical work may reflect that while the direct, negative consumer-welfare effects of minimum RPM are readily observable, the hypothesized procompetitive benefits are too ephemeral to be tested. Advocates of the procompetitive explanations do not even assert that the benefits are measurable empirically.

In this respect, minimum RPM differs sharply from the economic practices at issue in cases in which this Court has abrogated the *per se* rule against price fixing — in favor of rule-of-reason analysis — on the ground that the particular practice at issue arguably conferred benefits on consumers and competition. *See, e.g., Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 21-22 (1979). In these cases, the defendants alleged a consumer benefit from collusion that could be empirically verified. They asserted, and this Court agreed, that they were creating entirely new products, whose existence requires some elimination of competition — in *NCAA*, a sports league, and

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(Cont'd)

"empirical work"); Overstreet, *Resale Price Maintenance, supra*, at 1 (no procompetitive hypothesis "is well supported by available empirical evidence"); Richard Posner, *Antitrust Law* 151 (1976) (noting that economists' explanations have not "yet been tested empirically").

7. *See, e.g.*, Herbert Hovenkamp, *Vertical Restrictions and Monopoly Power*, 64 B.U. L. Rev. 521 (1984); Robert Bork, *The Antitrust Paradox* 280-98 (1978); Telser, *Why Should Manufacturers Want Fair Trade?, supra* (identifying no evidence in support of his "free rider" theory); *cf. id.* at 99-104 (discussing evidence supporting explanation that minimum RPM facilitates the creation of cartels).

in *Broadcast Music*, a blanket license. *See NCAA*, 468 U.S. at 101 ("this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all"); *Broadcast Music*, 441 U.S. at 21-22 (defendant had shown that blanket license offered jointly by individual license holders was "a different product" from that offered individually by license holders). By contrast, petitioner does not claim to have created a new product through minimum RPM and has no real-world evidence that its practices result in any measurable benefits to consumers.

The lack of empirical work may also reflect that the economic models are too inconsistent, general, and imprecise to yield clear predictions — true hypotheses — to test. *See* Karl Popper, *The Logic of Scientific Discovery* 72 (2002) ("a self-contradictory system is uninformative .. . because any conclusion we please can be derived from it" and no particular result "is singled out, either as incompatible or as derivable, since all are derivable"); *id.* at 116 (a theory should be "sufficiently precise to be capable of clashing with observational experience"). The explanations reach the "consensus" that petitioner touts, Pet. at 13, only by glossing over inconsistent premises or remaining at such a high level of generality that they could be thought consistent with almost any set of observed facts.

For example, the literature has not resolved even basic questions about whether, under the procompetitive explanations, one would expect to find evidence of market power at the supplier level in industries in which minimum RPM is used. Petitioner assumes that minimum RPM occurs in competitive interbrand markets. Pet. Br. at 22. This suggests that suppliers who use minimum RPM need not have market power. But much of the literature that petitioner cites posits that suppliers using minimum RPM must have market power — and, in effect, confer some of that power on retailers

in return for preferential treatment.[8] Similarly, the literature has not resolved whether one would expect to find higher-than-competitive returns among retailers subject to minimum RPM agreements. Some scholars assume not. *See* Bork, *The Antitrust Paradox*, *supra*, at 290 ("No manufacturer or supplier will ever use ... [minimum RPM] for the purpose of giving the resellers a greater-than-competitive return."); Hovenkamp, *Vertical Restrictions*, *supra*, at 524 (concluding that minimum RPM will not result in retailer profits beyond an ordinary, competitive market return). Others make the opposite assumption. *See* Winter, *Vertical Control*, *supra*, at 73 (positing that suppliers share "quasi-rents" with retailers in minimum RPM).

One would expect such inconsistencies to make it difficult to test the procompetitive position, and they have. *See* Overstreet, *Resale Price Maintenance*, *supra*, at 12 (notwithstanding the long time that economists have discussed possible procompetitive explanations regarding minimum RPM, the underlying theories "are not precise enough to generate distinctive testable hypotheses."). For example, one cannot draw meaningful conclusions from data about market power or retailer profits — two common indirect indicia of competitive effects — because, as noted above, *some* model is likely to fit the empirical evidence no

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8. *See* Easterbrook, *Vertical Arrangements*, *supra*, at 156 (suppliers must have power over price to confer something of value on retailers that will induce them to give special treatment to suppliers' goods); Overstreet, *Resale Price Maintenance*, *supra*, at 17 ("retailers would have little incentive to extract RPM from manufacturers of products . . . where the manufacturer does not have some market power, unless the dealers are able to induce RPM on all or most competing brands as well"); Telser, *Why Should Manufacturers Want Fair Trade?*, *supra*, at 87 ("a necessary condition to a manufacturer's use of resale price maintenance is that he must possess some degree of monopoly control over the price of the product").

matter what it shows. *See* Pauline M. Ippolito & Thomas R. Overstreet, *Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against the Corning Glass Works*, 39 J. Law & Econ. 285, 301 (1996) (noting that the "structural evidence . . . typically available in antitrust investigations . . . does not allow tests" of the procompetitive theories). Because the explanations are so malleable that they can generate almost any hypothesis one wants, they cannot be tested with any rigor.

2. In view of these obstacles, it is not surprising that the few empirical studies of procompetitive explanations draw only the weakest conclusions — conclusions that do nothing to advance petitioner's case. Pauline Ippolito's *Resale Price Maintenance* study, *supra* — a review of cases from 1975 and 1982 that involved allegations of minimum RPM agreements — is typical. The study did not test for the hypothesized consumer benefits directly. Instead, it merely tried to determine whether any of the procompetitive explanations had even "limited plausibility" in some of the studied cases. *Id.* at 293. Not surprisingly, Ippolito concluded that she could not entirely rule out the procompetitive explanations. Some cases, for example, involved products as to which the consumer might want more information. *Id.* at 282-85. Others involved products for which the retailer might add something tangible to the product, such as installation or post-sale adjustment. *Id.* at 285-89. Yet others involved products that an especially motivated retailer might be able to persuade a wavering customer to buy. *Id.* at 289-91. But showing that an explanation is merely plausible — in the sense of not obviously incorrect — is a far cry from showing that it is correct. Even Ippolito acknowledges that her analysis did little to fill the "empirical vacuum" in this area. *Id.* at 293.

Other studies are similarly unhelpful to petitioner's position. For example, "the most rigorous and complete empirical evaluation of an application of RPM" involved bread products subject to minimum RPM. Overstreet, *Resale Price Maintenance*, *supra*, at 126. Analysis "showed that the price of bread fell . . . and that the quantity of bread consumed was not adversely affected" when minimum RPM ceased. *Id.* The data thus were "inconsistent with the procompetitive . . . theory." *Id.* Another study found that the output and profit levels of a single company, Corning Glass Works, were higher during periods when it used minimum RPM than when it did not. But the study's scope was so limited that at most it could show, in this one case, that the data were "generally consistent" with procompetitive explanations. Ippolito & Overstreet, *Resale Price Maintenance*, *supra*, at 322.

3. Recognizing the lack of empirical support for their position, proponents of minimum RPM simply assume that there are unobservable benefits. *See* Winter, *Vertical Control*, *supra*, at 69 (noting hypothesis that suppliers are seeking "certif[ication] [of] product quality"); Ippolito, *Resale Price Maintenance*, *supra*, at 286 n. 38 (suggesting that minimum RPM could be justified for milk on the theory that higher margins will induce retailers of milk to provide greater "quality assurance"). Indeed, petitioner goes so far as to suggest that higher prices *are* the benefit consumers receive because consumers who pay more for a product feel better about the product's quality. Pet. Br. at 3 (asserting that putting a product on sale "degrades a manufacturer's brand" in consumers' eyes). There is no evidence, of course, that consumers in fact like paying higher prices. And even if that counterintuitive proposition were true, it still would not mean that on balance consumers are better off with the satisfaction of paying more for something than if they had the extra money to spend on other needs.

C. The Importance of Clear Guidance Provides an Additional Reason To Adhere To *Dr. Miles.*

Even if one could imagine hypothetical situations in which minimum RPM might benefit consumers on balance, that would not be a reason to abandon the *per se* rule that this Court has applied consistently. All that would show is that a *per se* rule might in theory be overbroad. But virtually all *per se* rules have overbreadth potential, and that has not alone been sufficient to undermine their value. For example, one might speculate that horizontal price-fixing could, in unusual circumstances, actually benefit consumers — perhaps, to take petitioner's own suggestion, by raising prices and thus enhancing consumers' perception of a product's quality. Nonetheless, because price is the "central nervous system of the economy," the *per se* rule is applied to horizontal price-fixing. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, 226 n.59 (1940).

Countervailing interests make the *per se* rule against minimum RPM appropriate even if it is not perfectly tailored. The *per se* rule, unlike the rule of reason, makes it clear at the outset what the Sherman Act prohibits. *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Bright lines make it possible for attorneys to advise their clients in advance what they may or may not do, thus avoiding litigation in the first place. And when there is litigation, the *per se* rule obviates the need for "an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable — an inquiry so often wholly fruitless when undertaken." *Id.*; *see also* Easterbrook, *Vertical Arrangements, supra*, at 155 ("Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the rule of reason.").

As frequent enforcers of the Sherman Act, the States are acutely aware of the benefits of clear standards. Antitrust lawsuits are by their nature difficult, complicated cases. Litigation under the rule of reason, rather than under the *per se* rule, is almost always more protracted and expensive for all involved. And if, as here, the potential for overbreadth is speculative at best, the benefits of a simple rule outweigh whatever theoretical imperfection inures in the *per se* rule. *Cf. Bus. Elecs. Corp.*, 485 U.S. at 723 (noting that the *per se* rule is appropriate "for conduct that ... would always *or almost always* tend to restrict competition" (emphasis added) (internal citation and quotation marks omitted)).

D. Applying the *Per Se* Rule Against Minimum RPM Is Consistent With Testing Other Vertical Restraints Against the Rule of Reason.

Minimum RPM is fundamentally different from other vertical restraints, such as territorial restrictions and maximum RPM, that are subject to the rule of reason. In deciding whether to apply the rule of reason or the *per se* rule, this Court has focused on "demonstrable economic effect." *Continental T.V.*, 433 U.S. at 59. For minimum RPM, as explained above, higher consumer prices are the demonstrable economic effect. Any supposedly procompetitive effects, by contrast, are speculative.

Other vertical restraints, however, may not always — or even usually — have the same uniform and direct harmful effect on consumers. For example, it is not obvious whether territorial restrictions on retailers ultimately raise or lower consumer prices. *See id.* at 51-56. Because both the anticompetitive and procompetitive effects of the practice are speculative, it is appropriate to apply the rule of reason. *Id.* at 57. Similarly, this Court explained that prohibiting maximum RPM agreements — agreements between a

supplier and retailer not to charge consumer *more* than a specified amount for a product — might prevent "lower prices" for consumers, which are "the very essence of competition" and a demonstrable consumer benefit. *Kahn*, 522 U.S. at 15 (citations and quotation marks omitted). Recognizing that maximum RPM also could have anticompetitive effects, this Court again applied the rule of reason. *Id.* at 16-18.

These other vertical restraints can, under some circumstances, have anticompetitive effects, but they also sometimes have demonstrable procompetitive effects. The rule of reason allows the courts to consider all the relevant circumstances in distinguishing good practices from bad ones. By contrast, minimum RPM has an obvious anticompetitive effect — higher prices. No one has found evidence of a procompetitive benefit, despite petitioner's strenuous claim that such a benefit exists. The *per se* prohibition is thus fully justified.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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